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NOTE

Domestic International Sales Corporation as a Subsidy Under GATT: Possible Remedies

INTRODUCTION

DUE IN PART to labor's increased wage demands and management's desire for profits, America's growing inability to compete on world markets in both technical and non-technical industries has become increasingly more apparent. This fact is reflected most dramatically in the balance of payments deficits that this country has run over the last few years,¹ which have most recently been reflected in two devaluations of the United States dollar. In perhaps a futile attempt to put some renewed life into export trading industries, the Nixon Administration proposed, and Congress passed the domestic international sales corporation (DISC) program.²

This note is an analysis of DISC in light of the current border tax adjustment problem, its possible contravention of the General Agreement on Tariffs and Trade³ determinations and goals, and the subsequent remedies available to injured trading nations.

I. WHAT IS A SUBSIDY?

As a result of six negotiations held under the auspices of the General Agreements on Tariffs and Trade (GATT), an international agreement came into effect in 1947⁴ for the primary purpose of gradually reducing tariff barriers. Since the adoption of the GATT agreement, non-tariff barriers have played an ever-increasing

¹See Wall Street Journal, Dec. 18, 1972, at 1.

²INT. REV. CODE OF 1954 § 992(1) (A) (1971).

³General Agreement on Tariffs and Trade, 61 Stat. A3 (1967); T.I.A.S. No. 1700; 55 U.N.T.S. 194 (1967) [hereinafter cited as GATT]. See Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250 (1967) where GATT is defined — "'GATT,' is a multilateral international agreement which is today the principal instrument for the regulation of world trade. Over eighty nations, including the United States, participate in GATT and it has been estimated that about eighty percent of world trade is governed by this agreement. With the recent completion of five agonizing years of 'Kennedy Round' tariff negotiations under GATT auspices, tariffs for many goods will be reduced to a point where they will no longer be effective barriers to world trade. For this reason, non-tariff trade barriers of wide variety and ingenuity are now becoming relatively more significant." (Footnotes omitted.)

⁴See GATT, Oct. 30, 1947, 61 Stat. A3 (1947), T.I.A.S. No. 1700, 55-61 U.N.T.S. (effective Jan. 1, 1948).

role in limiting world trade.⁵ One of the more common forms of non-tariff barriers is the subsidy.⁶ Whether intentional or unintentional, trade distortions result from governmental subsidies. In most instances the cost of a subsidy is borne by both foreign and domestic consumers.⁷ Regardless of who pays for the subsidy, it is usually maintained to stabilize a balance of payments position, to assist a developing domestic industry, to erase a competitive disadvantage, or to enhance national prosperity by increasing revenues from foreign trade. In any case, the goal is usually to supply a given market (domestic or international) with a particular good in a quantity which normally could be provided only at a higher price.

A subsidy has been defined as a form of support given by a government to an individual or producer who supposedly performs his task for the public benefit.⁸ It has also been called an act by a governmental unit involving a payment, a remission of charges, a supplying of commodities or services at less than cost or market price with the intent of achieving a particular economic goal.⁹

The form a subsidy can take varies widely. It can be granted in the form of a direct payment to exporters, or producers, or it can manifest itself in ". . . measures having an equivalent effect."¹⁰ Among GATT members there has been no official agreement as to what specific measures do or do not constitute a subsidy.¹¹ However, subsidies can be classified according to their destination and purpose as either production subsidies¹² or export subsidies.¹³

In a Western economy, the production subsidy¹⁴ could be said to exist as a result of a governmentally determined policy that certain

⁵ D. Wilson, *Non-tariff Barriers to International Trade: A Survey of Current Problems*, 18 J. PUB. L. 403 (1969).

⁶ A GATT Committee recently designated the following categories into which all the 276 barriers fell: Government participation in trade, customs, and administrative procedures, standards involving imports and exports, specific limitations on imports and exports, price mechanism restraints and others. 121 EUROPEAN COMM. BULL. 14 (March, 1969).

⁷ H. Malmgren, *Trade Wars or Trade Negotiations*, 8 ATLANTIC COMMUNITY Q. 470, 471 (1969).

⁸ See WEBSTER'S NEW WORLD DICTIONARY (1969).

⁹ See SUBSIDIES AND SUBSIDY-EFFECT PROGRAMS OF THE U.S. GOVERNMENT, materials prepared for Joint Economic Committee, 89th Cong. 1st Sess. (1965).

¹⁰ J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* at 425 (1969).

¹¹ GATT: BASIC INSTRUMENTS AND SELECTED DOCUMENTS, [hereinafter cited as GATT: BISD] 185-201 (1961); 10 BISD 208 (1962).

¹² See GATT: 9 BISD 186 (1961).

¹³ See definition *infra* note 27.

¹⁴ A production subsidy is tangible support given to a manufacturer to partially pay for or to maintain continued production of a commodity.

products are desirable and should be produced even though there may be little or no profit derived from their sale. Production subsidies are permitted under GATT Article III, 8(b)¹⁵ even though their net effect is to increase exports. On the other hand, an "export subsidy" is one given by a government directly, or indirectly to domestic producers, exporters, or purchasers of a good with or without a comparative advantage in the world market for the political or economic purpose of effecting a more competitive position.¹⁶ To this end, economic gains are realized by increasing the exporting country's balance surplus, or reducing its deficit, along with such political goals as achieving higher employment rates and reducing welfare or unemployment payments.

However laudable these goals may be, the various trading nations who are members of the GATT have recognized that the trade distortions which result from subsidies are in diametric contravention of GATT's proclaimed objective of liberalized trade.¹⁷ While there originally was no actual prohibition of general subsidies under the GATT,¹⁸ the Contracting Parties agreed in the 1955 Amendment to Article XVI — the principal subsidy regulation provision — that some measures were necessary to prevent export subsidies (as distinguished from production subsidies)¹⁹ from continuing as an artificial means of adjusting a country's comparative advantage. This Amendment provided that the Contracting Parties should "seek to avoid" subsidies on "primary products,"²⁰ yet contained no "teeth" or compelling language for enforcement. The act of subsidizing primary products was proscribed to the extent that no more than the product's original share of the world market could be

¹⁵ M.A.G. VAN MEERHAEGHE, *STRUCTURE OF GATT, INTERNATIONAL ECONOMIC INSTITUTIONS* at 162 (1969). Article III, 8(b) provides: "The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products."

¹⁶ This result, of course, is premised on the assumption of relatively great elasticity of demand for the product in the world market.

¹⁷ GATT, Art XVI, GATT: 3 BISD 30-31 (1955). "SB (2) The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement."

¹⁸ See GATT *supra* note 4. Also see VON MEERHAEGHE, *supra* note 10, at 168; J. LEDDY, *UNITED STATES COMMERCIAL POLICY AND DOMESTIC FORM PROGRAM, STUDIES IN UNITED STATES COMMERCIAL POLICY* 200-02 (Wikelley ed. 1963).

¹⁹ See *supra* note 14.

²⁰ A "primary product" is a product of farm, forest, fishery, mineral, natural or otherwise to make it marketable in world trade. GATT: Annex I, Ad Art. XVI, § B2.

gained.²¹ At the same time, preferential treatment was allowed primary products by exempting them from the retaliatory measures of Article VI. This treatment apparently reflected the tacit understanding among the Contracting Parties of the importance of allowing an emerging nation to develop its "primary products" and that any limitation on subsidization of such a product might retard the growth of such a nation's trading potential.

In 1962, agreement was reached among the contracting parties that non-primary products should carry a stronger subsidization prohibition.²² Article XVI paragraph 4 was then promulgated to prohibit the granting of export subsidies on non-primary products either directly or indirectly after a given date when a situation known as "dumping" results.²³ This occurs when the price of a good sold in the domestic market is higher than the price of that same good in an export market because of the incident subsidization. Seventeen countries, including the United States have accepted this provision, all of them being industrialized trading nations.²⁴ Most of the developing nations have not adopted it because of their reluctance to be regulated in their subsidization of "primary products" while the major trading nations continue to subsidize even their non-primary products.²⁵

The most general application of the term subsidy referred to in Article XVI (1) of the GATT could come in the form of income or price supports. No matter what form alleged subsidies take they would not be designated as subsidies unless they operated to increase exports.²⁶ In this respect, "increased exports" has been interpreted "to include the concept of maintaining exports at a level

²¹ It has been agreed that a nation's equitable share of the world market will be just that, and no individual market will be looked to in determining a violation. GATT: 7 BISD 52-53 (1957).

²² Declaration of 19 November 1960, Giving Effect to the provisions of Article XVI (4), GATT: 9 BISD 32 (1961).

²³ Of the various types of dumping — exchange dumping (manipulation of exchange rates), social dumping (the use of cheap labor to produce at less than normal costs), service or freight dumping (supplying cheap freight to the domestic producers who export), and price dumping — only the latter two are subject to retaliation under Article III anti-dumping and countervailing duties discussed later.

²⁴ Countries adopting 1955 Amendment.

²⁵ GATT Doc. SR 12/22, at 194 (1957); SR 14/12, at 21 (1959); SR 17/3, at 19 (1968). "Primary products" are products which are easily produced in a country because of some indigenous material available for its production. For the purpose of this note both "primary products" and "dumping" will be left for treatment elsewhere.

²⁶ GATT, Art. XVI, par. 1. See also J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* at 383 (1969).

higher than would otherwise exist in the absence of the subsidy."²⁷ This broad interpretation has been read to include any payment, or cost savings, direct or indirect, which provided an incentive to increase production which in turn might increase exports of any given product.²⁸ Concomitantly, this expansive reading is broadened further by the "directly or indirectly" language of Article XVI (1).²⁹ Thus a production subsidy prohibition would apply only when the goods so subsidized were destined for the export market whereas producers whose goods are headed for the domestic market receive subsidies protected by Article III (8) (b).

II. INDIRECT SUBSIDIES

The most obvious forms of direct subsidy are the direct payment to a private producer, and in some instances government purchases from specific producers.³⁰ Government purchases are outside the scope of the subsidy prohibition as they are allowed under Article III (8),³¹ while direct payments have generally been avoided, because of their obvious violative nature. On the other hand, because of their less overt characteristics, indirect subsidies have been used to reach specific goals, e.g. higher use of cheap raw materials or added employment, and have become the "darling" of the subsidy set.³² Indirect subsidies may take many forms. When a government

²⁷ GATT: 9 BISD 191 (1961).

²⁸ U.N. Docs. EPCT/127, at li EPCT/B/Sr.22, at 5-6 (1947).

²⁹ See J. JACKSON, *supra* note 10, at 384.

³⁰ Direct subsidy payment does not necessarily mean that a private producer will be entitled to make a profit as it may only maintain him on a marginal break-even basis.

³¹ The GATT approval disappears when the goods are then sold at a loss on a commercial scale. GATT: 9 BISD 185, 191 (1961).

³² Indirect subsidies take as many forms as can be imagined. See GATT: 9 BISD 186 (1961). One view would hold that almost any grant that helps a domestic industry could be viewed as a subsidy because it *pro tanto* strengthens that industry's comparative position. See C. Mathews, *Non-tariff Import Restrictions: Remedies Available in United States Law*, 62 MICH. L. REV. 1295, 1327 (1964). This position would find financial welfare, educational facilities, fire and police protection as representing the polemic extreme of subsidization. See J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* at 366 (1969). On a more direct level, subsidies have taken on the form of cost differential subsidies such as the Merchant Marine Act of 1936 (49 Stat. 2001-08, as amended, 46 USC § 1171-82) which provides protection for U.S. domestic ship builders and operators; accelerated tax depreciation for textile industry. (See I. KRAVIS, *DOMESTIC INTERESTS AND INTERNATIONAL OBLIGATIONS* 387 (1963); special credit facilities made available to purchasers of domestic agricultural machinery (See Italian-U.K. dispute over credit facilities given to domestic purchases. GATT Doc. SR 13/8 and 37+SR 13/3, at 181 (1958); GATT: 7 BISD 23, 60 (1959), Greek credit facilities, GATT Doc. L/740 (1957); a discriminatory rebate plan adopted to subsidize a steel industry (GATT Press Release 1013, at 19-70 (1967); and frequently transportation subsidies in spite of a specific GATT prohibition (See K. DAM, *THE*

supplies free labor, electricity, manufacturing facilities, transportation for raw or finished goods for a chosen industry or producer, this could be called an indirect subsidy. However, to provide these indirect subsidies actual capital outlays must be made. As a result, many nations have turned to ingenious forms of tax incentives to accomplish the same goal. For example, the Spanish have a tax provision which allows tax free reserves to be set aside for income derived from export sales.³³ A similar provision exists in the Norwegian income tax scheme.³⁴ In Australia there is a double deduction for export promotion expenditures from domestic income tax³⁵ plus a rebate of indirect taxes entering into the cost of production.³⁶ Japan allows an accelerated depreciation allowance for capital goods used to produce export items as well as an optional reserve fund into which a company may put up to 50 percent of its earnings on a 10 year deferral basis.³⁷ France also allows an accelerated depreciation allowance when the manufacturer exports more than 20 percent of his goods.³⁸ When goods are exported, income tax is at least partially exempted on all profits coming from Eire, Uruguay, and Iran.³⁹ The Dutch tax authority on occasion has entered into agreements whereby an importer of raw materials or semi-finished products was allowed to import without assessing a duty, on the condition that 90 percent of the total production of the importer would be destined for export.⁴⁰ This tax break is somewhat similar to the "draw-back" provision which the Canadian Government has used to stimulate both imports and exports.⁴¹

As can be seen, the United States is not alone in the use of tax incentives to stimulate export expansion. However, with its grow-

GATT — LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 140 (1970)); export credit insurance has been made available in some countries. *Id.* at 139. A closely associated form of indirect subsidy is the "tied loan." Some question as to the legitimacy of this practice can be raised *inter alia* on the "most favored nation" principle of Article I.

³³ See *Spain: A Tax-Free Reserve for the Promotion of Exports*, 7 EUROPEAN TAXATION 221 (1967).

³⁴ CONFEDERATION OF BRITISH INDUSTRY, TAXATION IN WESTERN EUROPE 1966, 214 (3rd rev. ed. 1967).

³⁵ See A. M. MOORE, TAXES AND EXPORTS 55-56 (Canadian Tax Foundation 1963).

³⁶ *Id.* at 56.

³⁷ W. DIAMOND, FOREIGN TRADE AND TAX BRIEFS 79 (1967). Also, a 3 percent gross revenue deduction from taxable income is allowed enterprises there.

³⁸ *Id.*

³⁹ GATT, Article VI (4): Interpretive Notes to the GATT, Ad. Art. XVI.

⁴⁰ A. M. MOORE, TAXES AND EXPORTS 9 (1963).

⁴¹ *Id.*

ing balance of trade deficits, the United States has found it necessary to add additional export tax incentives to its growing list of export stimulants. Before it can be determined whether these incentive devices are in violation of any international protocol or an examination of the scope of the tax rebate or exemption problem is in order.

III. THE SCOPE OF THE PROBLEM

Article III, paragraph 2 of the GATT,⁴² authorizes the imposition of internal taxes (taxes levied at various stages in the manufacture of domestic goods) upon imported products up to the amount levied upon "like domestic products."⁴³ These taxes are levied on imports at the point where the goods enter the country. They generally increase the retail price of the imported goods up to or above the amount of domestic manufactured goods. On the export side, Article XVI allows indirect taxes, which are paid on "like" domestic products to be rebated or exempted upon export as long as the remission is not greater than the cumulative tax paid at all the various stages of production.⁴⁴ The difficulty, of course, is found in ascertaining administratively the exact amount of cumulative tax paid during the manufacturing process.⁴⁵

To analyze exactly how equitable the GATT rules allowing border adjustments are and what effect they have on competition, it is necessary to determine what effect consumption taxes (sales taxes) and/or profits taxes (income or direct taxes) have on world trade prices and to what extent they are relied upon by the major trading nations of the world.⁴⁶ There are several forms of indi-

⁴² GATT, Article III, paragraph 2 provides: "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1."

⁴³ The income tax is a tax on producers, not a tax on products, but the European value added tax is a tax "on products."

⁴⁴ GATT: Annex I Ad Article XVI, provides: "The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy." An exception to countervailing duty imposition is also made for this action. GATT, Art. VI, paragraph 4.

⁴⁵ In most TVA countries this presented large initial problems but were subsequently worked out.

⁴⁶ For example, the European Economic Community, America's chief trading partner, relies heavily on indirect taxes, while the United States relies primarily upon income taxes (direct) for revenue raising.

rect tax utilized today, all of which are internal⁴⁷ and all adjustments in regard to imports required by such taxes are made at the point where the goods enter the country.⁴⁸ Luxury taxes,⁴⁹ excise taxes, single stage sales taxes,⁵⁰ value added tax (VAT),⁵¹ and cascade taxes have all been utilized by various countries and are familiar examples of indirect taxes.

In the United States the excise tax is used on a decreasing number of items and is not relied upon to any extent to raise revenues.⁵² This, coupled with the fact that Article VI does not view remission or exemption of indirect taxes, as exposing the exported good to any of the retaliatory measures of the GATT, has been said to put countries who rely heavily upon direct taxation (a tax on a manufacturing unit as a whole) at a distinct competitive price disadvantage in foreign markets. In essence the United States view of "direct tax" and the GATT view are not the same. The GATT applies to indirect taxes "on the product" while the United States relies almost exclusively on a direct tax, (labeled as an income tax), which is not "on the product," but on the producer. Because such income taxes cannot be rebated upon export nor charged on imports they appear to be unfair.

Because of the permissible rebate of indirect taxes when a good is exported, it has been alleged that nations who rely upon an indirect tax method enjoy an internal flexibility in their own tax rates

⁴⁷ An internal tax has been said to be a tax which is collected after the goods leave the customs in the importing country. U.N. Doc. EPCT/A/PV 43, at 24 (1947). However practical this distinction may appear it has been refuted. *Id.* It is the internal tax that requires "national treatment" by Article III. U.N. Doc. E/Cont. 2/C.3/SR.13, at 1: E/Cont. 2/C. 3/A/W.32, at 1 (1947-1940).

⁴⁸ Distinction principle generally refers to tax that is paid upon the product when it reaches its country of destination and a border tax is levied against it.

⁴⁹ GATT, Doc. L/234, at 1 (1954).

⁵⁰ GATT, Doc. 2/729 (1957): GATT Doc. SR 7/5 (1952).

⁵¹ GATT, Doc. 2/421 (1955).

⁵² For example, the percentage of GNP paid in corporate profit and indirect taxes in 1965 was as follows for some of the major trading nations.

	<i>Corporate Profit</i>	<i>Indirect</i>
Belgium	1.91	12.16
Canada	4.19	14.63
France	2.12	17.56
Germany	2.47	14.22
Japan	3.96	7.76
Norway	1.49	14.99
Switzerland	2.04	7.13
United Kingdom	1.90	14.10
United States	4.50	9.31

Source: 1968 *Trade Hearings*, *infra* note 74, pt 1, 55-56.

without jeopardizing their international trade posture.⁵³ This is true simply because a rise in the indirect tax rate will not be passed on to the price of the exported good due to the rebate. This facilitates an increase in revenue with no corresponding export market decrease. In defense of this advantageous tax system it has been argued that some European countries do have high income taxes,⁵⁴ especially in the business sector, and that in addition the Europeans have higher consumption taxes.⁵⁵ But whether these direct taxes act to dampen Europe's export business is open to much speculation.

Many nations use a system of directly taxing the income of producers.⁵⁶ The difficulty arises when producers pay a tax on goods in an exporting country which is a direct tax on their profits and then ship those same goods to a country which has a value added tax (VAT) system (such as the EEC). The producer who has already paid a direct tax on any profit he makes must pay the destination indirect tax of the importing country to the same extent as a "like domestic product." The net practical effect of what may in some instances be virtual double taxation is reflected in the higher competitive price in the importing country even though the exporting country may have had a comparative advantage in that good. Conversely, goods shipped out of the VAT countries are allowed a rebate of all taxes paid; they also are not required to suffer the direct tax the importing country imposes on producers of "like domestic products."⁵⁷ Theoretically, this will not make their price more competitive in the foreign market, but in practice it does. The nature of the border tax adjustments, may represent a form of subsidy by the exporting VAT country. Only to this extent can an argument be made that this system conforms to the letter of the GATT, and even so, it is clear that the system does further the principles of trade liberalization which underlie the GATT agreement.

How could such a potentially unfair tax basis distinction come into being? The answer is primarily historical. Under the GATT, indirect taxes already levied upon the product before export may be rebated to the various parties in the manufacturing-retailing chain

⁵³ See Maurice E. Peloubet, *European Experience with Value-Added Taxation*, 30 TAX POLICY 1043 (1963); E. Lindholm, *National Tax System and International Balance of Payments*, 19 NAT. TAX J. 163, 166, 171 (1966).

⁵⁴ See Organizations of Economic Cooperation and Development, *Border Tax Adjustments and tax structures in OECD member countries*, 195-252 (1968).

⁵⁵ See tables *supra* note 9. These direct taxes are levied upon the profits of a specific producer and not upon the individual product itself — thus the name origin tax.

⁵⁶ *Id.*

⁵⁷ GATT, Article III, paragraph 2.

who have already paid the tax up to an amount equal to the tax on "like" goods which have been imported for sale in the domestic market.⁵⁸ The underlying theory of this provision stems from the traditional economic model under which income taxes are born by the producer and not shifted forward into the price of the product as are indirect taxes.⁵⁹ Additionally, if not for the export rebate of indirect taxes, imports would be encouraged and exports discouraged.⁶⁰ Under this same model, assuming pure competition, the price of the goods is set by the marginal producer. Since the marginal producer is theoretically just breaking even he pays no direct (income) tax. Value-added taxes, on the other hand, are added to the goods at each step in the manufacturing process, theoretically to be passed on to the consumer in the form of absolute higher prices. This form of taxation makes the goods less competitive in the world market, thereby justifying the rebate.⁶¹

Today, there appear to be two major flaws in this theory. First, the ever-increasing concentration of capital in any given industry creates a model of oligopolistic competition, thus vitiating to some degree both the theory of marginal price setting and total direct tax absorption.⁶² To this extent the direct tax upon producer's profits can be passed on to the consumer to whatever degree the enterprise finds socially palatable and economically feasible. Second, various pressures which might include competition, government influence and consumer resistance may have caused the indirectly taxed businessman to absorb some of this tax. If he does absorb some of the tax to meet competition in the world market then the rebate of all prior value added taxes upon export could represent a subsidy to the extent that the entire amount of the tax is rebated, possibly offsetting some production costs loss. This same principle applies when a direct tax on profits is passed on to the consumer as there is little or no evidence direct tax reductions are shifted forward in the form

⁵⁸ GATT: 9 BISD 186 (1960).

⁵⁹ M. Leontides, *The Logic of Border Taxes*, NATIONAL ASSOCIATION MFG. REV. 4 (April 14, 1966); 19 NAT. TAX J. 173, 178 (1966).

⁶⁰ M. Weathers, *Some Implications of the GATT Rules Governing the Treatment of Domestic Taxes in International Trade: The Case of Germany Since the Currency Reform of 1948*, 23 NAT. TAX J. 103 (1970).

⁶¹ This second theory would hold that there would be no absorption of the indirect tax as there would be under the direct tax system.

⁶² If a tax is a cost, which is true of all business except a monopoly which passes the tax along, then it must be included in income and price. R. Lindholm, *National Tax System and International Balance of Payments*, 19 NAT. TAX J. 163, 167 (1966).

of price reductions.⁶³ In addition, the production unit in both the direct and indirect instance carries the burden of the tax, no matter how the burden is measured.⁶⁴ As a result, to the extent that these propositions are born out in full, the traditional economic model, as a basis for GATT authorization of border tax adjustments, is proved invalid.

The critics are quick to point out that given the lack of data to substantiate the traditional theory there is much reason to doubt its validity, especially when excise and income taxes are distributed throughout the production process.⁶⁵ Thus the border tax issue has been called the most difficult question in the non-tariff field.⁶⁶ Other writers would go so far as to say that most American economists have rejected the traditional theory,⁶⁷ while the most critical have said that the indirect tax rebate is "a conspicuous form of discrimination against U.S. imports."⁶⁸ Accordingly, American economists have suggested that the United States change the direct tax system to take advantage of the border tax adjustment.⁶⁹ The situation, as manifested in the balance of payments statistics, has worsened apparently, fueled to some extent by the uniform adoption of the VAT by the EEC countries and the United States adoption of the Excise Tax Act of 1965,⁷⁰ which reduced or eliminated excise taxes on most import items.

An obvious example of the resultant disparity in the export market price for a given item could be found in the French circuit breaker situation. The French firm could sell its high voltage circuit breaker in the United States at around \$200,000 while the same system would cost \$350,000 in France. The United States supplier's price for the identical breaker was around \$300,000.⁷¹ This is only an example of actual pricing disparities which come about due to the existence of a dual taxing system.

⁶³ J. McNamara, *Tax Adjustments in International Trade: The Border Tax Dispute*, 3 J. OF MARITIME LAW 339 (1972).

⁶⁴ See *supra* note 10, at 179.

⁶⁵ C. McClure, *Commodity Tax Incidence in Open Economics*, 27 NAT. TAX J. 189-195 (1964).

⁶⁶ Frank, *Reducing Trade Barriers: The Next Fold*, INTERPLAY, April 1, 1969, at 21.

⁶⁷ See *supra* note 10, at 178 (1966).

⁶⁸ SUBCOMMITTEE ON FOREIGN POLICY OF THE JOINT ECONOMIC COMMUNITY, 90TH CONG. 1ST SESS., THE FUTURE OF U.S. FOREIGN TRADE POLICY 5 (Comm. Print 1967).

⁶⁹ See P. Pryer, *EEC Border Taxes Import Considered*, J. OF COMM., Dec. 22, 1967, at 1.

⁷⁰ 79 Stat. 136 (1965).

⁷¹ J. R. Morrill, quoted in *Electrical World*, March 11, 1968.

The ultimate conclusion one must draw from the foregoing is that when the GATT was drafted, and its provisions adopted by the United States and other signatories who depend primarily on direct taxes, some contracting parties did not fully comprehend the full-blown ramifications of Articles II, III, VI, XVI,⁷² were too rushed to give these provisions full consideration,⁷³ or never thought that indirect taxation would eventually play such a major revenue raising role.⁷⁴ It is easy to say, in retrospect, that this should have been predicted,⁷⁵ but then hindsight often points out the obvious.

Many solutions to this complex problem of border taxes and taxation distinctions have been put forward. One proposal would have GATT amended to provide for rebates of both direct and indirect taxes on imported goods to the extent that they are truly shifted forward into price.⁷⁶ A closer inspection of this idea would indicate that not only might this form of amendment end up back-firing, but unless some relatively simple formula were devised to segregate tax costs in a given product, the task involved in segregating the tax incidence might prove gargantuan.⁷⁷

Another proposal has been to either implement border taxes in

⁷² J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 207 (1969).

⁷³ See E. Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 VIR. J. INT. LAW 82, 114 (1969).

⁷⁴ See GATT: 10 BISD 201 (1962).

⁷⁵ Those who would defend the present system would statistically argue that corporate income taxes in Europe account for a smaller proportion of gross national product than in the United States. (i.e., 1.5-2.5% of GNP in 1966 in France, Germany, Italy, the Netherlands and Sweden, compared to 4.6 of GNP in the U.S. and 5.1 in the U.K. In those countries the corporate sector is smaller and corporate profits account for about half of what they do in the U.S. This manifests the fact that a larger portion of European national output does not come from a corporate entity. The statutory and effective rates of income tax are similar in Europe and the U.S. with Japan equal to or higher. Social Security Contributions are a direct levy and cannot be rebated under the GATT. These work out to be much higher in Europe than in Japan or the U.S. If one of the forthcoming suggestions is taken, and these social security taxes are allowed to be rebates, the trade position of the U.S. might be worsened. See STATISTICAL OFFICE OF THE U.N., *YEARBOOK OF NATIONAL ACCOUNTS STATISTICS*, 1967 (1968); J. McNamara, *Tax Adjustments in International Trade: The Border Tax Dispute*, *supra* note 68, at 361; *Organization for Economic Cooperation and Development, Border Tax Adjustments and Tax Structures in OECD Member Countries* (1968).

⁷⁶ See M. Weathers, *Some Implications of the GATT Rules Governing the Treatment of Domestic Taxes in International Trade: The Case of Germany Since the Currency Reform of 1948*, 23 NAT. TAX. J. 102 (1970).

⁷⁷ See, J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 302 (1969) where Mr. Jackson credits Mr. John Evans with this idea. The abolition of border taxes, negotiation of subsidy levels, and also the negotiation of the level of border taxes are discussed. In addition, the direct taxes of the countries now on the TVA would also be rebated thus only marginal benefits to direct tax countries would ensue. See *Hearings before the House Ways and Means Comm. on Tariff and Trade Proposals*, 90th Cong. 2d Sess., pt. 1, at 54-56 (1968).

a way consistent with the principles of Article II (which would allow countervailing duties) or to set the border taxes at a more realistic rate in line with the theory that indirect taxes are not entirely shifted forward.⁷⁸ The Department of Commerce has proposed that the United States adopt a VAT system of its own.⁷⁹ Although this proposal is currently being studied, it has been said that if only this change in the present tax structure were made there would probably be no significant trade benefits accruing,⁸⁰ because if only the corporate income tax on profits were reduced, benefit could be derived to the extent that the costs are passed along to the export customer in the form of lower prices (assuming high elasticity of demand for the given product).⁸¹

Criticizing the tax incentives already enacted by the United States Congress which contemplate future additional tax "incentives," some commentators have argued that tax incentives are no more than "windfalls" to the exporter as there really is no evidence that the incentives will expand exports.⁸² In spite of this argument, the United States government has introduced export incentives via the tax mechanism, regardless of GATT consequences, on the premise that "practical experience suggests that export tax incentives will work."⁸³ It should be pointed out, however, that prior to the DISC several somewhat similar tax incentives were tried, each meeting limited acceptance and success. These will be discussed later in this paper.⁸⁴

IV. U.S. "SUBSIDIES" — TAX INCENTIVES

On December 10, 1971, President Nixon signed into law a tax provision designating a Domestic International Sales Corporation (DISC) which would allow a 50 percent tax deferral on corporate profits derived from foreign activities to a corporation that met the

⁷⁸ Proposal of the Synthetic Organic Chemicals Manufacturing Association to Senate Finance Comm. In Anderson, *Border Taxes, Fair or Unfair*, CHEM. OF ENG. NEWS, Jan. 22, 1968, at 66.76-77.

⁷⁹ See DEPT. OF COMMERCE, UNITED STATES FOREIGN TRADE: A FIVE YEAR OUTLOOK (1969).

⁸⁰ See J. McNamara, *supra* note 63, at 339.

⁸¹ *Id.* See also, REPORT OF THE PRESIDENT'S TASK FORCE ON BUSINESS TAXATION 65-69 (1970).

⁸² Surry, *Current Issues in the Taxation of Corporate Foreign Investment*, 56 COLUM. L. REV. 815, 845-46 (1956); A. M. MOORE, TAXES AND EXPORTS (Canadian Tax Foundation 1963).

⁸³ T. Jenks, *The Export Trade Corporation: Orphan of the Storm*, 67 COLUM. L. REV. 1187, 1208 (1967).

⁸⁴ These will be discussed later in this paper.

included requirements. The main policy objective of this legislation was to stimulate U.S. exports by allowing generous tax deferral privileges to domestic corporations.⁸⁵ More specifically, the DISC provision was included in the Revenue Act of 1971,⁸⁶ and could be adopted by a qualified corporate entity chartered in any state. It must be a corporation which sells or services goods in foreign countries, the income from which is substantially (95 percent of gross receipts)⁸⁷ derived from exports. Income can come from sales, rentals, loans to other exporters, or interest from export obligations.⁸⁸ This sales corporation must make an election to be treated as a DISC, the prerequisite of which is *inter alia* stated capital of at least \$2,500.⁸⁹ In addition to maintaining its DISC status, the corporation must continually meet the 95 percent qualified assets test. This test may be met by the corporation holding assets in the form of assets needed to carry on the direct export business, investments in stock or securities of foreign customers, loans to domestic producers, or temporary deposits in the United States or Export-Import Bank paper.⁹⁰ The 50 percent tax deferral does not include income derived from loans to domestic producers, or on U.S. deposits.⁹¹

The tax deferral provided for in DISC exists until the tax income is distributed, liquidation occurs, or the corporation is disqualified as a DISC. If either of these latter two situations occur, the tax on the deferral income may be prorated over a 10 year period.

Additional criteria must be met in order for a corporation to maintain its status as a DISC. At least 50 percent of the total cost of the export property must be made or produced in the United States.⁹² As an added incentive to the 50 percent tax deferral, 10 percent of the deferral amount can be added for "export promotional expenses."⁹³ Another important feature of the DISC is that accumulated earnings tax⁹⁴ and personal holding company⁹⁵ provi-

⁸⁵ R. Bagley, *A DISC in Your Future*, TAXES at 548, Sept. 1970.

⁸⁶ Revenue Act of 1971, Act Sec. 501, 502 (e), and 503 (d), adding Code Sec. 992 (a), (d) and (e), and amending Code Secs. 922 and 931(a). U.S.C. § 1221, 1227, 1228.

⁸⁷ See *supra* note 85 at 552.

⁸⁸ INT. REV. CODE OF 1954 § 992 (a) (1) (A) (1971).

⁸⁹ INT. REV. CODE OF 1954 § 992 (a) (1) (C) (1971).

⁹⁰ INT. REV. CODE OF 1954 § 992 (a) (1) (B) (1971).

⁹¹ *Id.*

⁹² This limitation, it could be argued, effectively excluded participation by foreign goods and to treat extant acts as a subsidy to the whole American made portion of the exported good.

⁹³ INT. REV. CODE OF 1954 § 992 (a) (2) (1971).

⁹⁴ INT. REV. CODE OF 1954 §§ 531-537 (1973).

sions do not apply to it. A DISC cannot engage in the manufacturing of the product it sells or services overseas; to do so would be to jeopardize its DISC qualification. As opposed to an Export Trade Corporation (ETC), the DISC has no limitations upon the amount of income that can be tax deferred. Unlike the ETC, no limitation exists as to whom a DISC can sell goods or from whom it buys. Furthermore, an ETC as a foreign corporation, cannot shield as much income from United States taxation as can a DISC.⁹⁶

The United States provides several other tax relief provisions designed both to stimulate exports and to recover lost tax revenues due to foreign incorporation. The Western Hemisphere Trade Corporation (WHTC)⁹⁷ provision of the Internal Revenue Code applies to a domestic corporation and grants a tax reduction (down to about 34 percent), but only to corporations who export solely to the Western Hemisphere.⁹⁸

The underlying purpose of both the ETC and WHTC legislative grants was to make exporting for U.S. manufacturers at least as profitable taxwise as selling from foreign plants. More dramatically, Subpart G, which granted a deferral privilege on income where the business engaged in improved the balance of payments position of the United States, was passed with the obvious intention of offering "... encouragement to export trade."⁹⁹ Unfortunately, none of the goals of these tax entities has been achieved due to the lack of taxpayer acceptance. This in turn was based chiefly upon the highly complex nature of the provisions, the numerous restric-

⁹⁶ 54 MINN. L. REV. 245 (1970); INT. REV. CODE OF 1954 §§ 541-547 (1973).

⁹⁷ R. Bagley, *A DISC in Your Future*, 48 TAXES, 556.

⁹⁸ INT. REV. CODE OF 1954 § 921.

⁹⁹ INT. REV. CODE OF 1954 § 992 (a) (1) (1971). A further restriction in the WHTC is that it not have any overseas operating bases. Subpart F (ETC), being more like a DISC allows a corporation, which qualifies to defer Subpart F income if it is export trade income. This deferral is allowed if the ETC engages in "substantial export activity," and the deferrable income is then reinvested in facilities and assets that expand export trade. Additional ETC restrictions demand that for the three years immediately prior to a taxable year, 90 percent of gross income comes from sources outside the U.S. See A. Shenk, J. Balkin, *Subpart G. Tax Incentives for Export Trade: A Technical Analysis of Tax Haven Operations*, 54 MINN. L. REV. 245 (1970). 15 percent of income comes from the exportation of U.S. goods or services, INT. REV. CODE OF 1954 § 954 (b) (1) (1971), where as the WHTC requires that 90 percent of this corporation's activities must be from trade or business and 90 percent of its income from sources outside the U.S., INT. REV. CODE OF 1954 §§ 970-72 (1971). Also, the vendor or lessee of ETC goods must be "unrelated" to the export trade corporation. S. Rep. No. 1881; 87th Cong. 2d Sess. 91 (1962). Another provision is an appendage to Subpart F, Subpart G, INT. REV. CODE OF 1954 §§ 970-72 (1971). Return for certain tax exemptions, requires income from the sale of domestically produced goods to be reinvested in qualified foreign assets.

⁹⁹ S. Rep. No. 1881, 87th Cong., 2d Sess. 91 (1962).

tions, and the limited tax benefit derived.¹⁰⁰ On the other hand, the reduction of complex restrictions and generous income tax deferral contained in DISC may prove to be enough to sell it to American exporters.

Whether the DISC will gain any wider acceptance than the tax incentives mentioned above remains to be seen. Other problems, such as whether DISC's deferral system as an export incentive may be contrary to our international trade commitments as manifested in GATT should in reality be faced before too many exporters begin to rely upon it as a mode of business behavior.

V. DOES THE DISC VIOLATE THE GENERAL AGREEMENT ON TARIFFS AND TRADE?

Even though the granting of tax exemptions by various countries is wide spread¹⁰¹ it is important for taxing authorities to at least consider the legal ramifications of granting such potential subsidies in light of the broad prohibitions in GATT. This analysis must be done if only to ensure and maintain cooperative adherence to the GATT.

Perhaps the first and most difficult question to resolve concerning the DISC is its tax deferral aspect. Nowhere in GATT is there reference to the consequent action that is allowed nor the legality of a tax deferral *per se*. Presumably sufficient facts could be brought forward to establish that the deferral was a smoke screen for an exemption. However, since this cannot be established with any clarity, the deferral system cannot be said to be directly covered by any provision of the GATT. Yet considering that time means money, a long enough deferral period could well approach an exemption for tax purposes.¹⁰² At least this is what a GATT Working Party could conclude.¹⁰³

¹⁰⁰ T. Jenks, *The Export Trade Corporation: Orphan of the Storm*, 67 COLUM. L. REV. 1187, 1205 (1967).

¹⁰¹ *Id.* at 1207.

¹⁰² R. Bagley, *A DISC in Your Future*, 48 TAXES, 548, 552.

¹⁰³ A Working Party is an Ad Hoc Committee set up by the Contracting Parties to settle disputes among member countries. See GATT, Art. XVI (A)(1) which provides: If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the Contracting Parties in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quality of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization,

Because the DISC deals with the deferral of direct taxes, it is essential to determine if the GATT provides for the exemption of producers from direct taxes. As far as a subsidy is defined Article XVI and VI purposes,¹⁰⁴ the major trading nations have defined it to include rebates and exemptions of direct taxes, social welfare, or charges on commercial enterprises¹⁰⁵ as distinguished from "duties and taxes born by the like product."¹⁰⁶ The thought and intent may have been there in the 1960 Working Party¹⁰⁷ proposal put forth above, but no substantive definition of subsidy was established.¹⁰⁸ Although there was no binding effect given to this proposal, it does indicate a general consensus within that Working Party on the question of exemptions and rebates of direct taxes. This Panel did agree that a subsidy which provided incentive, although not calling for countervailing measures, would for the sake of Article XVI (1) be assumed to increase exports or reduce imports.¹⁰⁹ From the reading of the DISC statute, it would be difficult to argue its purpose was not export oriented, thus meeting at least the Article XVI (1) minimum definition of a subsidy.

Along this same line, it has been said that the purpose of preferential tax treatment is to provide an incentive to, or to stimulate the growth of a particular type of business activity, and that this

the contracting party granting the subsidy shall upon request, discuss with the other contracting party or parties concerned, or with the Contracting Parties, the possibility of limiting the subsidization.

¹⁰⁴ Art. VI provides in part:

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or "threatens" material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

- (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or
- (b) in the absence of such domestic price, is less than either
 - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
 - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

¹⁰⁵ See "Declaration Giving Effects to the Provisions of Article XVI: 4 (1963), 3 UST 2605, T.I.A.S. No. 5227, 445 U.N.T.S. 294; GATT 9 BISD 185-88 (1961).

¹⁰⁶ See GATT: Annex I, Ad Article XVI, *supra* note 44.

¹⁰⁷ A Working Party is a group of Contracting Parties working on a special problem.

¹⁰⁸ See GATT: 9 BISD 187 (1961).

¹⁰⁹ *Id.* at 191.

should be considered a form of subsidy.¹¹⁰ Although this could be partially countered by the fact that a DISC has a broader application than to one industry, it might still further help categorize the DISC as a subsidy.

Further arguments could be marshalled against the DISC deferral plan. For example, Article III, paragraph 8,¹¹¹ permits payments of subsidies to domestic "producers." It does not address itself to domestic exporters. Whether a DISC could be considered a producer within the broadest sense of the language is questionable as it is in reality only a forwarding sales corporation.¹¹²

Another challenge to the deferral system might come under the Addition to Article XVI, which provides:

The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.¹¹³

This language would allow an exemption from duties or taxes if the same "product" when shipped domestically had similar taxes attached. Here, the exemption or rebate on the exported goods would not be considered a subsidy if it did not exceed those born by the domestic goods. Once again an interpretive problem — which could prove fatal to a direct tax rebate — appears in the language "like product" as opposed to like producer. Lack of inclusion here logically indicates exclusion of direct tax rebates, or exemptions, from the GATT's intent to exempt only indirect taxes from application of Article XVI sanctions. On the other side of the argument, as far as DISC's treatment of tax deferral in relation to Article III, paragraph 2 is concerned, 5 percent of its products may be sold domestically. The income generated by those sales is eligible for, and inclusive in, the 50 percent deferred income category. That being the case, the Article III requirement for equal treatment for export and domestic sales would not appear to have been met. While this same problem would not be present in the Western Hemisphere Trade Corporation, it has been said to be debatable whether the WHTC rate reduction violates any other provi-

¹¹⁰ E. OWENS, *THE FOREIGN TAX CREDIT*, 572, 557 (1961).

¹¹¹ See GATT, Article III (8) (b), *supra* note 3.

¹¹² If the DISC were included in such characterization the result would be to facilitate an internal conflict between Article III, 8(b), allowing production subsidies, and the Article XVI paragraph 1 language "increases exports." The lack of desirability of this result most likely would work against this definition of "producer."

¹¹³ GATT: Annex I, Ad Article XVI, *supra* note 44.

sion of the GATT.¹¹⁴ Moreover, the preferential treatment for income generated by sales establishments abroad "does not seem objectionable," and certainly tax deferment, as exemplified by Subpart G of the Internal Revenue Code said not to be prohibited.¹¹⁵ It has also been said that it is the form of the tax exemption that was determinative, not the fact.¹¹⁶ However, without further analysis, this conclusion appears inadequate in light of the numerous GATT provisions that bear on the problem of a deferral system.

Another well-founded interpretive argument could be made that Article VI, paragraph 4,¹⁰⁹ phrased in the negative, would prevent countervailing duties from being levied upon a "product" by an importing country because of the exemption from taxes or duties in the exporting country when the internal products of that country do bear the tax.¹¹⁷ Once again the "product" language steps in to defeat the American producer tax deferral. This is supported to some extent by the statement that the "product" language of GATT, Articles XVI and VI, paragraph 4, was not meant to include taxes levied on the producer.¹¹⁸ Where does the non-producer middleman of DISC fit into this scheme? One answer would appear to be simply that he pays income tax and this is not excepted from Article VI, paragraph 4 treatment.

As the DISC does not deal with the imposition of internal taxes upon imported products, it cannot be argued that its favorable treatment of export subsidies is contrary to Article III, paragraph 2, dealing with "national treatment" of domestic and imported products. Because of the high percentage of the DISC product that must be sold in foreign countries (95 percent) this would act to counter an attack on it as being contrary to the "national treatment" policy expounded upon in Article III, paragraphs 2 and 4.¹¹⁹

¹¹⁴ T. Jenks, *The Export Trade Corporation: Orphan of the Storm*, 67 COLUM. L. REV. 1187, 1207 (1967).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ GATT, Article VI, paragraph 4 provides: "No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."

¹¹⁸ See *supra* note 44.

¹¹⁹ See GATT, Article III paragraph 2, note 10. Paragraph 4 provides: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differ-

Paragraph 8(b) of Article III,¹²⁰ providing for subsidies to domestic producers from funds raised internally, would arguably not authorize DISC tax deferrals. The basis for this argument is found in the interpretation of the word "producer." A "producer," for the purposes of Article III, paragraph 8(b), is one who *manufactures* a product. Since the DISC is not by definition a producer but merely an exporting sales organization, it should not qualify for this exemption. Also, since the exclusive treatment of imports in kind and degree would be found to be a violation of Article III,¹²¹ it could be argued by analogy that exports should not be specially treated. Paragraph 8(b) would vitiate the argument that the 5 percent domestic sales would be allowed in view of the paragraph 2 language preventing "laws, regulations, and requirements affecting internal sales," from being applied "so as to afford protection to domestic production" as prescribed in paragraph 1 of the same article.

Finally, if it were found necessary to defend against a countervailing duty, an argument could be made that in spite of the foregoing, the deferred tax of DISC is technically not an exemption or remission as referred to in Article VI, paragraph 4, but merely taxable income set aside in a reserve. In the short run, the result would appear to be the same, as an exemption or rebate, but in the long run there would be no tax advantage. If a GATT Working Party were to confront these arguments it is conceivable that it

ential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product." A specious argument may also be made that the "national treatment" of Article III, paragraph 2, requires that imported and domestic products be treated identically and that allowing deferral of income on only domestically produced goods is in contravention of that mandate. The flaw in this reasoning is that imported products themselves are not subject to income taxes in the United States and therefore not subject to different treatment as therein prescribed. The only "non-national" treatment involved would be the tax treatment of a domestic corporation when it exports domestic goods as opposed to previously imported goods. However, it is doubtful that Article III speaks to the secondary export of a previously imported product. However, if the goods included in the 5 percent domestic sales allowed the DISC were priced so as to reflect such tax deferral there may be an arguable violation of Article III, paragraph 2, and provide domestic protection contravening paragraph 1 (to the extent the deferral was shifted into price in the domestic market). On the other hand, since the direct tax would not touch the imported product, the protection of the DISC-sold product would appear to fall into the realm of protected behavior. The Havana Reports III, U.N. Doc. ICITO/1/8 at 63, paragraph 44 (1948) indicate that exemption from income tax does not come within the prescribed behavior of paragraph 2. In conjunction with the deferral, when the DISC product is sold in an export market at a higher price than in the domestic market this may create a dumping situation subject to anti-dumping duties provided for in Article VI. Consequently, the pricing policies of the DISC must be carefully scrutinized.

¹²⁰ See *supra* note 15.

¹²¹ GATT: 5 BISD 185 (1957); GATT ANALYTICAL INDEX 24 (2d rev. 1966).

could find the DISC contrary to the general principles of trade liberalization as provided for by the GATT preamble and subject to any or all the remedial relief provided in the agreement.

VI. REMEDIES

Originally, Section A, Article XVI, governing both export and production subsidies, was the only proscription in the GATT.¹²² Unfortunately, the requirements of this section called only for notification and consultation when a subsidy on an imported product was discovered by the importing country.¹²³ The generally proscribed subsidy could take on almost any form, as long as it operated to "increase exports of any product from" any territory (member country). Ideally, the subsidizing country would notify the importing country of the type, effect, and extent of the exporting or production subsidy and why it was necessary to grant it. Also, when "serious injury" to the commercial interests of the importing country were found, various levels of distribution were provided.

Production subsidies presumably would be included in this reporting requirement, but allowed as per Article III, paragraph 8(b). However, the residual export subsidies certainly would be subject to the reporting requirements. In addition, soon after the GATT was adopted, the "increased exports" language was determined to include the maintenance of exports at a higher than normal level.¹²⁴ The expanded prohibition had only limited effect because, as with the original uninterpreted prohibition, it did not apply to subsidies that were given prior to each country's adoption of the protocol agreement.¹²⁵

Having realized that many subsidies would stay in effect in spite of the work sanctions of paragraph (1), it was decided by a Working Party in 1955 that the objectives of free trade could best be realized if export subsidies — which most dramatically distort the comparative advantages of trading countries — could be brought under more stringent controls.¹²⁶ Thus, Section B of Article XVI was adopted. The free trade goal was articulated in paragraph 2 as the desired end. Paragraph 3 addressed itself to the export sub-

¹²² See GATT, Article XVI(A) (1), *supra* note 103.

¹²³ GATT, Article XVI (A)(1), *supra* note 103.

¹²⁴ GATT: 2 BISD 39, 44 (1950).

¹²⁵ Protocol Amending the Preamble and Parts II and III of GATT, 1955.

¹²⁶ See 445 U.N.T.S. 294, 298, 302, 303 (1962): It was put into effect in 1960 and accepted by 17 countries, GATT: 9 BISD 32 (1961).

sidy on "primary products" in terms of maintaining a given percentage of the world market. For the purpose of this discussion, however, the exportation of manufactured goods will be dealt with solely, thus ignoring the major ramification of this provision. To this end, paragraph 4 is of more crucial significance.

Article XVI, paragraph 4,¹²⁷ basically attempts to temporarily halt, and ultimately eliminate, all export subsidies which traditionally lead to a "dumping" situation. By specific exclusion, it did not apply to primary products which were provided for in paragraph 3, and applies only to those countries who adopted the 1955 Amendment, and to those signing the Declaration accompanying paragraph 4. This paragraph would obviously be called into action if the DISC exported non-primary products and the price of those products, in the importing country was less than in the United States. The tax deferral of DISC would have to be shown as the "causal" factor for the actual or threatened "serious prejudice" called for in Article XVI, paragraph 1, ultimately calling for discussions with the injured party.¹²⁸

In sum, Article XVI has not been used to any large extent because of its generally ineffective remedial sanctions. The notification provision specifically has not been used because of the reluctance on the part of most developed countries to point an accusative finger at another contracting party in view of their own subsidization programs.¹²⁹ If it were not for its lack of stringency, this article would appear more desirable as a means of remedy because it does not require prior GATT authorization to put it into effect as does Article XXIII.¹³⁰

Article VI generally, and the countervailing duties¹³¹ provisions of paragraph 3-6 more specifically, are utilized via domestic legisla-

¹²⁷ GATT, Article XVI, paragraph 4 allows:

Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing subsidies.

¹²⁸ See *supra* note 103.

¹²⁹ Most importantly, anti-dumping provisions of Article VI would be available. This is not likely to be the case if the tax deferral allowed the DISC is passed on via the 5 percent domestic sales generated by the company.

¹³⁰ GATT: 10 BISD 206, 207, ¶ 20 (1962).

¹³¹ The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.

tion by governments of importing countries against the subsidized products of exporting countries. Article VI does not prohibit subsidies *per se* as an exception to the basic consultation remedies in GATT. Instead, Article VI provides a self-help mechanism for countries to which subsidized goods are imported. It has not been used extensively as a retaliatory device, however the trend seems to be toward an expansion of its use.

Article VI, paragraphs 1 and 2, address themselves to a subsidizing program for a product which results in a dumping situation. In paragraph 3, a definition of "countervailing duty" (CD) is set out to mean "a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise."¹⁸² This language could be read to include almost any subsidy as there is no reference to any narrower interpretation included elsewhere in the GATT. Given this reading, nothing adequately explains why countervailing duties have not been employed more frequently, except perhaps the sense of double standard which might exist in the minds of the countervailers.

While limiting the level of countervailing duties to the amount of "estimated" subsidization granted by the exporting country, paragraph 3 provides no adequate standard for eliminating subsidies. Presumably, the difference between the price of the imported product and the "like" domestic product could be used as well as the difference between the price of the good in the importing country and its domestic price in the exporting country. In spite of the lack of any clear cut methods of determining injury and subsidization, countervailing duties have been turned to with greater frequency by the United States in the last 10 years.¹⁸³ The paucity of complaints by American businessmen, which are a necessary statutory requirement to the use of countervailing duties, stem from the fact that member exporting countries have not been vigilant to insure that rebatable taxes were actually passed on in the form of higher prices in foreign markets. This very situation is exemplified by the aforementioned failure to develop an adequate uniform test for determining the amount of shifting that has taken place. It has become more difficult for the "injured" importing country to determine the amount of subsidy granted. This indefiniteness would appear to leave

¹⁸² GATT, Article VI, paragraph 3.

¹⁸³ Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments and the Resurgence of the Countervailing Duty*, 19 GEORGETOWN L. CENTER J. L. AND POLICY INT'L BUSINESS 17.

each country free to shift for itself as far as estimating the amount of subsidy. Accordingly, the United States Customs Bureau does not make a concerted effort to determine the amount of shifting that has taken place in regard to a specific product, but simply examines the relationship of the particular tax to the product involved.¹⁸⁴ An example of the difficulty inherent in determining the amount of subsidization resulting from an indirect tax rebate was addressed by the Common Market Countries when it attempted to decide whether an Italian rebate system was valid under the Treaty of Rome, Article 96.¹⁸⁵ In this case the Italian government had provided a rebate of indirect taxes not based on taxes actually paid but on an average of taxes paid by all manufacturers of the product. This, of course, would result in a subsidy if the actual tax paid on the product was less than the average. Because the tax was not imposed upon the product at the various stages of manufacture but on the productive unit, the entire rebate was held to be a subsidy. However, the question of amount of subsidy was never addressed. Consequently, no formula was developed to provide guidelines for the determination of the "estimated" amount of subsidy for later cases. This lack of accuracy has not prevented countervailing duties from being imposed. The United States has imposed countervailing duties upon Italian steel units for electrical transmission towers,¹⁸⁶ and welded wire mesh.¹⁸⁷ Mainly, because under existing United States policy, discretion in the President does not countervail; it is mandatory once a subsidy has been established. However, if more accurate ways of measuring subsidies could be devised, perhaps countervailing duties would be used more often. This still would not answer the question of how an importing country could determine the level of subsidy which went into a DISC distributed product imported into its territory and shown to be causing material injury. Even though only an estimate was required, unless there was developed an accurate criteria for measuring the "bounty" the resultant countervailing duty would probably be based on nothing more than an educated guess.¹⁸⁸

¹⁸⁴ E. Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 VA. J. INT. LAW 82, 116 (1969).

¹⁸⁵ Much like Article VI of GATT, Article 96 of the EEC treaty provides for rebates when they do not exceed actual internal charges.

¹⁸⁶ T.D. 67-102, 32 Fed. Reg. 6274 (1967).

¹⁸⁷ *Id.*

¹⁸⁸ A panel of experts commissioned in 1960 to study both countervailing and anti-dumping duties spent most of its time on the latter thus formulating the Anti-dumping

Another restriction in the use of countervailing duties is contained in paragraph 5 which would forbid countervailing duties if an anti-dumping duty has been imposed upon the same product. The policy behind this appears to be that when the "anti-dumping" duty — which is levied to narrow the difference in price between what a product costs in its domestic market and the lesser amount charged in the market to which it is sent — has already been levied, any subsidy used to achieve the "dumping" effect has already been offset. However, making countervailing and anti-dumping duties mutually exclusive in any given situation cannot be seen in any way as effecting the ultimate result of applying either form of remedy separately. It does appear to foreclose the possibility of applying both measures so as to yield a protectionist position for a domestically competitive product.

Perhaps the most relevant restricting subsection to the discussion of the DISC is Article VI paragraph 4.¹³⁹ This excepting provision supplemented by Article XVI would allow the imposition of a countervailing duty except when the subsidy came in the form of an exemption or remission of taxes or duties *borne by like products*.¹⁴⁰ This phrase has been interpreted to mean that because direct taxes are imposed upon a taxpaying entity in the exporting country, and not the individual product, direct taxes are not included within the language of this exemption from countervailing duties.¹⁴¹ It could be argued that either countervailing or anti-dumping duties could be imposed on a product whose import market price was lower simply because of the exemption from or rebate of direct taxes on the exporting producer. A similar result could flow from the misap-

Code in 1967. See GATT: 8 BISD 145; GATT: 9 BISD 194, 200 (1961). This Code does not provide any guidelines for countervailing duties, but argument by analogy can be resorted to when lack of more definite standards or criteria cannot be found. The code requires material injury be found prior to the imposition of anti-dumping duties and can be found by weighing factors such as, was this the principal cause of the injury or retardation to a developing industry? Were there other factors that retarded or slowed the growth of this industry?

In an attempt to solve some of the interpretive problems in Article VI, (1) and (6) the Code stressed that the mere allegation of material injury would not be adequate as a basis for the imposition of anti-dumping duties. This restraint could arguably apply to countervailing duties. Likewise, "convincing evidence" should be required to establish retardation of an infant industry, T.D. 88-149, 33 Fed. Reg. 8224-25 (1968), and threat of "material" injury should be based upon facts "clearly foreseen" by the exporting country. GATT, Article VI, paragraph 8 (b).

¹³⁹ See Article VI, paragraph 4, *supra* note 117.

¹⁴⁰ GATT: Ad Article XVI.

¹⁴¹ See generally J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 297 (1969); E. Butler *Countervailing Duties and Export Subsidization; A Re-emerging Issue in International Trade*, 9 VIR. J. INTER. LAW 82, 113 (1969).

plication of a GATT authorized rebate on indirect taxes as in the Italian situation discussed *supra*,¹⁴² or from a direct tax exemption.¹⁴³ But again, the "like" product question would come up in much the same way it does in the anti-dumping situation.

As with many other articles of GATT, Article VI has also undergone interpretive clarification since the signing of the original Protocol Agreement in 1947.¹⁴⁴ In 1948 a GATT working party provided for additional forms of compensation for injured contracting parties as long as they were consistent with the provisions of GATT.¹⁴⁵ A second amendment expanded the definition of "injury," as used in Article VI, paragraph 6 exclusively, to include situations where a third country, injured as a result of a countervailing duty, could be compensated by a contracting party imposing a countervailing duty.¹⁴⁶ At the end of the Kennedy Round it was postulated that a code to regulate subsidies and countervailing duties should be promulgated.¹⁴⁷ As yet nothing has developed from this idea.

According to Article II, paragraph 2(b)¹⁴⁸ a countervailing duty can be imposed at any time by a contracting party as long as it is consistent with Article VI. This provision read concurrently with Article VI, paragraph 6(b)¹⁴⁹ would preclude the need for the in-

¹⁴² See text accompanying notes 134 & 135.

¹⁴³ This can be exemplified by the indefinite tax deferral provision contained in DISC.

¹⁴⁴ Protocol Amending the Preamble and Parts II and III of the GATT, 1955 (Agreement No. 33 in App. C).

¹⁴⁵ 19 GATT: 2 BISD 41 (1952).

¹⁴⁶ 20 Protocol Amending the Preamble and Parts II and III of GATT, 1955 (Agreement No. 33, App. C).

¹⁴⁷ See K. DAM., *THE GATT — LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 179 (1970).

¹⁴⁸ GATT, Article II (2) provides:

Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

(b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;

(c) fees or other charges commensurate with the cost of services rendered.

¹⁴⁹ GATT, Article VI, paragraph 6(b)

"The Contracting Parties may waive the requirement of sub-paragraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The contracting parties shall waive the requirements of sub-

jured contracting party to show the injury was caused, or threatened, by the subsidized product before countervailing that product. Therefore, any country receiving products forwarded by a DISC might use this remedy to defeat the tax deferral price advantage upon its own determination. This would be accomplished by the importing country calling into effect its domestic countervailing duty statute, which if passed after the 1947 Protocol was signed, would require the supposedly injured country to show that there has been a threat or material injury to a domestic industry.¹⁵⁰ The Article II, paragraph 6(a) provision, with its concomitant equivocation in distinguishing injury, threatened injury, and retardation, can be shown to be a handicap compared to other countries that do not have this injury provision expressly or impliedly included in their statute.

One country without such a requirement is the United States. Its countervailing duty statute¹⁵¹ does not require that injury be demonstrable prior to its application. As stated earlier, this would contravene Article VI, paragraph 6(b) but for the fact that the 1947 Protocol to GATT made it applicable "to the fullest extent not inconsistent with existing (domestic) legislation."¹⁵² This exemption has also allowed the United States to apply its countervailing duty statute to situations where private subsidies have been given. However, most GATT contracting parties enacted their statutes after the GATT's adoption in 1947.¹⁵³

Countries that do not have to establish injury to impose countervailing duties would appear to be able to make even more liberal use of their statutes because Article VI does not make reference to an increase in exports or decrease in imports as a prerequisite to the

paragraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party."

¹⁵⁰ GATT, Article VI, paragraph 6(a) provides:

"No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."

¹⁵¹ 19 U.S.C. § 1303 (1964). The amount of duty is determined by the Commissioner of Customs when authorized by the Secretary of the Treasury and it is paid in addition to other duties bound into the GATT schedule 2. 19 U.S.C. § 1303 (1970); 19 C.F.R. § 16.24(e) (1969).

¹⁵² See GATT Doc. L/309, Add. (1955); L/2375, Add. 1, 2 (1965).

¹⁵³ See *Analysis of Anti-dumping Laws of the Federal Republic of Germany, France, Italy and the United Kingdom*, A.R.A. Section on Int'l and Comp. L. Bull., Dec. 1965 at 20; see also 1 CCH COM. MKT. REP. ¶ 3883 (1968).

use of a product subsidy. To this extent, these duties could be used whenever a subsidy was ever proven. Finally, Article VI, paragraph 6, subsection (c),¹⁵⁴ which authorizes a contracting party, who might be injured by any delay in implementation of countervailing duty, to impose such duty without prior Contracting Party approval, limited only by a reporting requirement. Although this duty would have to be withdrawn if it were not approved, this subsection more dramatically demonstrates the flexibility that the entire Article enjoys.

If in the particular country affected by DISC importation of goods, injury would have to be demonstrated prior to the imposition of a countervailing duty, both injury and causation would have to be shown for Contracting Party approval. Here, as in anti-dumping duty situations, definitional problems as to "principal cause" must be faced. Because the remedial action provided an injured contracting party in the GATT is voluntary, the provisions which exemplify the spirit of the entire Agreement are Articles XIV, XVIII, XIX, XXII, XXIII, and XXVIII. All of these articles generally, and Article XXII specifically, provide for consultation among the disputants. These Articles in effect create a forum which today is essential to the orderly solution to international disputes.¹⁵⁵

Under Article XXIII,¹⁵⁶ a Working Party can be created to serve

¹⁵⁴ GATT, Article VI para. 6 (c) which reads:

"In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the Contracting Parties; Provided that such action shall be reported immediately to the Contracting Parties and that the countervailing duty shall be withdrawn promptly if the Contracting Parties disapprove." Different criteria for injury such as a 50 percent reduction in domestic "like" production (if that can be defined) could be used as the threshold injury for countervailing duty imposition. As mentioned earlier, this requirement does not apply to all countries thus in predicting that immediate countervailing duties could be imposed against the DISC products the individual importing countries' statute would have to be scrutinized.

¹⁵⁵ GATT, Article XXII entitled Consultation states.

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consideration regarding such renegotiations as may be made by another contracting party with respect to any matter affecting the operation of this agreement.

2. The contracting parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

¹⁵⁶ GATT, Article XXIII Nullification or Impairment

"1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

the quasi-judicial function of resolving disputes that arise under GATT. Sometimes a panel — a more objective, non-representative and less political group of parties convening in a similar capacity — will be created to solve a problem under the Agreement. In either case the body thus created will take evidence, hear arguments, and ultimately resolve the disputed issue. The results of the working party or panel are then given legal effect through the Contracting Parties' acceptance of the group's report. After the report is accepted the violative party is required under Article XXII to give the formulated solution "sympathetic" consideration.¹⁵⁷ Once the working party rules against a contracting party, the injured party may be authorized by Article XXIII, paragraph 2, to remove concessions previously granted. The concession withdrawn may not be of a punitive nature, but only up to the amount of the concession impaired.¹⁵⁸

As an alternative to the aforementioned provisions, remedial action may be taken by the importing country if unforeseen injury results from the granting of a concession under the "escape clause" provision of Article XIX.¹⁵⁹ In such event the injured party may

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it."

¹⁵⁷ GATT, Article XXIII, para. 1 (c).

¹⁵⁸ The use of Article XXIII as a remedial measure has been confirmed by a 1955 Working Party report. GATT: 3 BISD 224 (1955). Since its inception, there have been 13 calls for consultation under it. J. JACKSON, *WORLD TRADE AND THE LAW OF GATT*. 379-80 (1969). A good example of the type of issues involved is found in the case where Australia removed its subsidy on Ammonium Sulphate to Chile's detriment. Australian Subsidy on Ammonium Sulphate, Report Adopted by the Contracting Parties, April 3, 1950; GATT: 2 BISD 188 (1952).

¹⁵⁹ GATT, Article XIX(1) provides: Emergency Action on Imports of Particular Products

"1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of

suspend, withdraw, or modify an equivalent concession if a determination that a competing domestic industry is "injured" after an agreement had been negotiated with the offending contracting party.

As with Article VI, Article XIX is compensatory in nature. However, before Article XIX can be utilized, a notice to the Contracting Parties¹⁶⁰ must be given. Only then can there be consultation among the parties involved, a showing of injury and causation by the injured party,¹⁶¹ and finally, if agreement is not reached, the unilateral suspension of concessions back to their pre-negotiation level.¹⁶² This provision also allows for selective retaliation for any country which has "substantial interests" in the product upon which concession was negotiated.

Article XXVIII is another alternative remedial measure. However, the presence of a three year delay provision, and the fact a party must make concessions to bring about any change, render this article less than ideally suited to the control of a tax subsidy such as DISC.¹⁶³ While prior GATT approval is unnecessary, allowing the negotiating country to retain its retaliatory rights — rights it will negotiate in light of Article XXVIII — allows the Contracting Parties to designate a country with a principal supplying interest who will also negotiate in regard to some product concessions. In addition, a country with a "substantial interest" will be allowed to consult in the negotiations. If an agreement is reached "substantially equivalent concessions" may be withdrawn by the negotiating party. Although this provision limits retaliation to equivalent concessions it must by its nature be applied with Most Favored Nation effect. Further, this provision allows easy enforceability

a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury."

¹⁶⁰ GATT, Article XIX, § 2.

¹⁶¹ *Id.* § 1 (a).

¹⁶² *Id.* § 1 (b).

¹⁶³ This provision is called into play when the result of subsidization is to effectively remove the concession granted by one party to a negotiation to another. While the negotiations and consultations are called for only once every three years, it provides a platform from which an injured country, without having to prove injury, can negotiate with an eye on bettering its position with respect to products of the injuring country which were previously given concessions while rectifying that it knows to be a subsidizing situation.

plus effectiveness when the two major parties concerned are of somewhat equal bargaining strength.

In spite of the fact that subsidy levels can be discussed at the tri-annual negotiation sessions, they hardly ever are.¹⁶⁴ This is true even though specific authorization for negotiations on this subject at regular Article XXVIII meetings was provided for by a 1955 Working Party.¹⁶⁵ Subsequently, at the Kennedy Round of trade negotiations, agricultural export subsidy reductions were discussed.¹⁶⁶ Although nothing concrete in regard to limitation of subsidies was decided, the fact that they were brought up appears to be encouraging index of the diminution of prior reluctance on the part of these negotiating countries to ignore the fact that each of them has a subsidization program of some kind in existence.

The last remedial provision of the GATT, Article XXV, paragraph 5, which in essence amounts to a waiver by one country of its retaliatory measures in response to what another country might do to it in violation of GATT. The likelihood of the extensive use of this program is not great in light of the Contracting Parties supposed commitment to live by the GATT and its objectives.

VII. CONCLUSION

In spite of the lack of a delimiting definition for export subsidizing behavior proscribed by the GATT, it can be generally said that any indirect export incentive scheme which would cause a country to artificially maintain a comparative advantage in a product in which it normally would not, is a form of subsidy. According to interpretations of GATT, when such a subsidy is maintained by a rebate or exemption of direct taxes it will be in violation of various GATT provisions including its stated policy objectives of free trade based on true comparative advantage. The DISC tax deferral which is in effect a permanent forgiveness of a tax liability is close enough to such an exemption to allow a working party to classify DISC as a violation of GATT, thus exposing its distributed product to remedial action by countries who import those goods.

If no remedial action is taken, however, it will be because of the failure of the contracting parties to diligently eliminate old methods of direct and indirect subsidization, and avoid the export in-

¹⁶⁴ K. DAM, *THE GATT — LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 147 (1970).

¹⁶⁵ GATT: 8 BISD 116 (1960).

¹⁶⁶ GATT: 12 BISD 36 (1964).

centive as a method to artificially stimulate their own employment and trade balance surpluses. In the spiral of increasingly numerous tax schemes to achieve this latter end, the DISC would appear to be just another device by which one large contracting party can with one hand slap free trade on the back and with the other pick its pocket.

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